## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

BIG RIDGE, INC.,

Respondent,

AND

Cases 14-RC-12824 14-CA-30379

14-CA-30406

UNITED MINE WORKERS OF AMERICA,

**Charging Party.** 

## EXCEPTIONS OF BIG RIDGE, INC. TO DECISION OF ADMINISTRATIVE LAW JUDGE

Now comes Big Ridge, Inc. ("Company), by its undersigned counsel, and files the following exceptions to the Decision of Administrative Law Judge ("ALJ") Jeffrey D. Wedekind issued on December 1, 2011. Argument and record and case authority in support of these exceptions will be contained in a separate brief in support of exceptions, to be filed contemporaneously herewith.

The Company takes exceptions as follows:

- 1. To the ALJ's finding (p. 2 line 12) that employee Waller was a "prominent union supporter."
- 2. To the ALJ's finding (p. 3 lines 17-19) that with respect to the election objections, the Company "has failed to fully satisfy its burden in one respect or the other under the relevant standards."
- 3. To the ALJ's finding that employee Waller was not an agent of the UMWA (p. 3 line 42 and fn. 4) and that the Company's brief "appears to concede this" (p. 3 fn. 4).

- 4. To the ALJ's failure to find that althoughWaller "admitted using the word 'scab' quite a lot underground" (p. 3 line 43), he denied doing so when it served his purposes while testifying.
- 5. To the ALJ's finding (p. 4 lines 19-20) that "[b]oth Pezzoni and Koerner testified that the alleged threat occurred while they were working together, i.e. side-by-side, underground" but that "beyond this, their accounts diverge."
- 6. To the ALJ's insinuation (p. 4 lines 36-41 and fn. 6) that in preparing the Company's witnesses, Counsel for the Company suggested to employees that they slant or fabricate testimony to be consistent with each other rather than tell the truth, and that this preparation "arguably... was inconsistent with the purpose of the sequestration order" and (p. 5) "arguably implicit and therefore reasonably encompassed within the express terms of the *Greyhound* order."
- 7. To the ALJ's failure to find (p. 5 line 13) that the differences between the testimony of Pezzoni and Koerner were "minor and explicable" and to the finding that (line 15) "there are other substantial reasons to doubt their testimony about the alleged incident."
- 8. To the ALJ's finding (p. 5 lines 22-23) that "both Pezzoni and Koerner had pecuniary and/or personal interests in testifying for the Company against Waller" and (lines 28-29) "both gave incredible testimony on these and other matters as well."
- 9. To the ALJ's finding (p. 6 lines 7-11) that Waller "impressed me as a credible witness overall," testified in an "earnest and even manner, demonstrated good memory and recall, and was not overly defensive or evasive."
- 10. To the ALJ's further finding (p. 6 lines 9-11) that Waller "readily admitted to a number of things that could be used against him, including, as noted above, that he used the word

- 'scab' a lot and wrote and sang an unflattering song about scabs," and to the implication that Waller's alleged admissions bolstered his credibility.
- 11. To the ALJ's finding (p. 6 lines 13-14) that the Company "has failed to establish by a preponderance of the evidence that the first alleged threat occurred."
- 12. To the ALJ's finding (p. 6 line 35) that "there are significant problems with Kirk's testimony" and (line 46) "substantial reasons to doubt Kirk's testimony."
- 13. To the ALJ's finding (p. 7 lines 6-7) that Kirk "had both a pecuniary and personal interest in providing evidence to support the Company's objections" and therefore can be found to have given dishonest testimony and that (line 9) "his testimony about other alleged incidents lacked credibility as well."
- 14. To the ALJ's finding (p. 7 lines 11-13) that the testimony of Waller and Carrigan denying Kirk's testimony "is consistent with other, undisputed evidence and their overall testimony and demeanor and the record as a whole provide no substantial reason to discredit it."
- 15. To the ALJ's findings (p. 7 lines 24-34) that the Union's failure to call its Local Financial Secretary Clayton to testify about the Kirk-Waller incident that Clayton witnessed was of no moment, that "given the other evidence presented at the hearing, which as discussed above persuasively discredits Kirk's allegations, there was no real need to call Clayton to testify" and that an adverse inference is "inappropriate."
- 16. To the ALJ's finding (p. 7 lines 36-38) that the Company "has failed to establish, by a preponderance of the credible evidence, that either of the alleged threats by Waller actually occurred."

- 17. To the ALJ's finding (p. 7 line 47) that "there are substantial reasons to doubt Kirk's testimony" about a threat by employee Kirkman, including that Kirk "never identified any other employee who would have witnessed the incident" (lines 49-49), and that Kirk (pp. 7 line 51 p. 8, line 1) "never mentioned it to anyone...until after the Union won the election..." and (p. 8 lines 7-8) had a "pecuniary and personal interest in bolstering the Company's election objections and overturning the election." The Company also takes exception to the ALJ's finding (p. 8 lines 19-20) that Kirkman's denial "is worthy of belief despite his interest in preserving the Union's favorable election results" and (lines 22-24) that the Company "has failed to establish, by a preponderance of the credible evidence, that the alleged threat by Kirkman actually occurred."
- 18. To the ALJ's finding (p. 8 line 44) that "there are substantial reasons to doubt Morrow's testimony" about a threat he witnessed by employee Pinkston to employee Hansen, and to the ALJ's frivolous suggestion (p. 9 lines 16-21 and fn. 9) that an adverse inference could be drawn against the Company for failing to call other rank and file employee witnesses to corroborate Morrow's testimony. The Company also takes exception to the ALJ's finding that Morrow, an ex-employee of Respondent, was "not a disinterested witness" (line 23) because he opposed the Union when employed by Respondent. The Company further takes exception to the ALJ's finding (p. 10 lines 1 2) that employee "Hansen's version is the more credible description of the conversation," to the ALJ's failure to comment at all upon the credibility of Pinkston and to the finding (lines 8-9) that the Company "failed to establish, by a preponderance of the evidence, that the alleged threat by Pinkston actually occurred."

- 19. To the ALJ's finding (p. 10 line 27) that "there is substantial reason to doubt Pezzoni's testimony" about anonymous threats he received, including because he (lines 29-30) "never contacted the phone company or the police to investigate who had made the anonymous calls" and didn't tell the Company about the calls until after the Union won the election (lines 30-32).
- 20. To the ALJ's findings (p. 10 lines 41-50) that "at a minimum, Pezzoni has embellished or exaggerated what was said in the calls"; that "I discredit his testimony that the first anonymous caller said that 'there is more than one way to skin the cat' or 'made any similar statement or threat'", as "there is no other evidence of the call" and that the Company "has failed to establish that any such statement or threat was made." Exception is also taken to the ALJ's finding (lines 48-50) that "as for the second call, I find that...at most...the anonymous caller said that he had seen what Pezzoni had posted on Facebook and to 'watch it.'"
- 21. To the ALJ's discrediting of employee Koerner's testimony that he received an anonymous call before the election that if he didn't vote for the Union it could be "bad for his family" and "things could happen underground to look like an accident." (p. 11 lines 5-13). The ALJ erroneously discredited Koerner because he testified he did not report the threat to the Company at the time it occurred, rationalizing that it was "just stuff going on; I didn't worry about it" (Lines 17-18). The ALJ erroneously found that because Koerner didn't tell anyone in management about the call until after the election, there was not sufficient evidence that the call "actually occurred." (Line 25). The ALJ thus inferred that no call was made because it was "inherently improbable" that Koerner "would not have been worried" or told someone about the call. In this regard, the ALJ

- ignored the most obvious reason for Koerner's delay in reporting the call, i.e. that as a new employee at the Mine, he did not want to stand out and have his fear become known to the very people who would make such threats. The ALJ's wholesale discrediting of Koerner's testimony with respect to the anonymous call and the later actions of employee Waller underground (discussed below) defies common sense and the record as a whole.
- 22. To the ALJ's wholly inappropriate and seemingly biased remark that "unfortunately" there are "substantial reasons" to doubt the testimony of employee Glover that he received an anonymous telephone call before the vote threatening his job if the mine didn't "go union" (p. 11 lines 37-45). The Company also takes exception to the ALJ's speculation that because "it does not appear [Glover] was in any real danger of losing his job at the time" (line 40), Glover's testimony about the threat must not be credible. The Company takes further exception to the ALJ's noting that the Company "never called" witnesses to whom Glover may have related this threat "to corroborate his testimony" and that Glover "admitted [as if a sin] that he opposed the Union during the campaign". Contrary to the ALJ's comment, the Company could not call witnesses to "corroborate" the call to Glover; the call was a one-on-one event between the caller and Glover. The Company also takes exception to the ALJ's specious and unsupported findings: that "Glover did not impress me as a particularly reliable witness overall" (p. 12 line 5), "I discredit Glover" (p. 12 line 12) and that the Company "has failed to establish that the alleged call actually occurred (line 13).
- 23. To the ALJ's finding that the threat by Union Recording Secretary Bradley to employee Pezzoni was "ambiguous and relatively innocuous" and stands apart from other threats to Pezzoni for credibility purposes.

- 24. To the ALJ's finding (p. 13, line 1) that Pezzoni's credibility was "dubious overall."
- 25. To the ALJ's discrediting "in its entirety" the testimony of employee Shoulders and crediting the testimony of employees Shires and Pinkston, for all of the reasons stated by the ALJ at p. 14 lines 5-33 and fn. 16, including that Shoulders did not give a statement about the matter until four days after it happened (id. at 25-27), that there were no corroborating witnesses called for Shoulders' testimony (lines 21-22), and that Shoulders made "admissions" in his testimony (id. at fn. 16). The ALJ erred in finding that the Company "has failed to establish by a preponderance of the evidence that the alleged incidents actually occurred" (lines 31-32).
- 26. To the ALJ's finding (p. 14 lines 40-41) that the Company has "failed to establish" that the "two incidents" found by the ALJ "warrant a new election, either individually or cumulatively"
- 27. To the ALJ's statement at p. 15 line 7 that "[a]nonymous phone calls....are evaluated under the so-called 'third-party' standard."
- 28. To the ALJ's findings that the anonymous telephone call received by employee Pezzoni just involved the words "watch it" and nothing more (p. 15 line 16); that "neither the speaker nor the context is known" (id. at 23); that it is "unclear" which of Pezzoni's Facebook comments the caller was referring or responding to"; that it is even relevant which of the Facebook comments was being responded to, if any (id.); that Pezzoni posted "derogatory" comments about Union officials and other persons/employees; that such could justify the threats to Pezzoni (lines 29-31); that the caller's comment could "reasonably be interpreted as a lawful warning rather than an improper threat" (lines 37-38), including a "warning that [Pezzoni's] public comments might have undesirable legal

consequences" (lines 38-39); and that the comment was "a relatively tame threat in the context of the [Company's] workplace" (p. 16 lines 12-13). The company also takes exception to the ALJ's comparison of the anonymous threat to alleged evidence of "direct and explicit threats of physical harm during arguments among employees" and to his findings that such threats "were a frequent and tolerated occurrence at the mine" (p. 16 lines 12-14), that there was "disparate treatment" of employee Waller (lines 12-13) and that there is "no record evidence that any employee at the Mine read Pezzoni's post about the call on his Facebook page or otherwise knew about the call prior to the election" (lines 16-17).

- 29. To the ALJ's finding (p. 16 lines 20-23) that the Company "has failed to establish that the anonymous caller's bare comment that Pezzoni should 'watch it' was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible."
- 30. To the ALJ's failure to follow the Cedars Sinai Medical Center case (p. 15 fn 17).
- 31. To the ALJ's finding that the comment from Union agent Bradley to employee Pezzoni was "not particularly severe" (p. 16 line 41); that "[i]f this was a threat of physical harm, it was wearing an unusually thick veil" (p. 17 lines 6-7); that [i]n context, Bradley's comment would more reasonably be interpreted as a mere expression of skepticism about Pezzoni's professed uncertainty"(lines 8-9); that "there is no evidence that...any other UMWA officer or agent made any similar comments to any other employees" (lines 8-10); and that the Company "has failed to establish that Bradley's isolated comment to Pezzoni warrants overturning the election" (lines 13-14).

- 32. To the ALJ's finding that as the Company "has failed to establish that any of the other alleged threats actually occurred" and that its "first objection is without merit" (p. 17 lines 15-16).
- 33. To the ALJ's finding with respect to the Company's election Objection #2 that "...there is no evidence that it was the Union, as opposed to just one of its supporters" that created and distributed false documents regarding the Company's relationship to Patriot Coal (p. 18 lines 12-13); that "the [Company] has failed to establish that the posting or distribution of the...documents by union officials or supporters...warrants overturning the election" (id. lines 35-37); that the Company "failed to meet its burden" (p. 19 lines 8-9); that there is "no contention or evidence that any of the information that the Union or its supporters obtained off the internet was altered in any way (p. 19 lines 9-10); that "the employees could easily identify the documents as campaign propaganda" (id. line 14); that "it is obvious that the first document was spliced together" (line 15) and that it is somehow probative that "both it and most of the other documents also had handwritten notations on them" (lines 17-18); that the Board's decision in Albertson's Inc. is "distinguishable" (lines 22-29); that "the absence of documentation" from the Company was the reason employees "remain[ed] skeptical" (lines 31-32); that the Company's second objection is "without merit" (line 41); and that the "relationship between Peabody Investment and Peabody Energy and Big Ridge (and Patriot Coal, if any) was never fully addressed or explained by..."any former or current officer of Peabody" (p. 19 fn. 20) and the Company also takes exception to the ALJ's erroneous finding that he would "reach the same conclusion under the broader rule adopted by the Sixth Circuit in Van Dorn Plastic Machinery Co. v. NLRB" (id. at fn. 21).

- 34. To the ALJ's finding that the Company's Objection #3 is "without merit" (p. 20 line 45) and that the effect of the letters sent by Union president Greg Fort (id. at lines 14-22 and 28-32) was not to falsely represent that the Union was "already the collective-bargaining representative of the unit even before the election" (id. at lines 9-10).
- 35. To the ALJ's erroneous conclusions that there is no evidence that "the Union orchestrated a campaign to intimidate and mislead employees," that there is not a "sufficient basis...to set aside the results of the...election" and that the Union is "properly certified" (p. 21 lines 5-12).
- 36. To the ALJ's finding with respect to the discharge of employee Waller that "it is again noteworthy, however, that there are several inconsistencies in their accounts [referencing testimony of Human Resources Senior Manager Gossman and Peabody Vice President Benner]" (pp. 44-45 fn. 44). In fact, the alleged inconsistencies are minor and of no consequence.
- 37. To the ALJ's findings regarding the meeting between Waller and Gossman on May 27, to the extent that said findings credit the testimony of Waller over the testimony of Gossman (p. 45 lines 5-18 and fn. 45); to the ALJ's finding that the flagging incident between Waller and Koerner has "now evolved" into the Company's primary justification for Waller's discharge (id. at fn. 45); and to the ALJ's suggestion (id.) that the Company "found" employees to make false allegations against Waller (id.).
- 38. To the ALJ's finding that Waller was "one of the strongest and most outspoken UMWA supporters at the mine" (p. 47 lines 8-9).

- 39. To the ALJ's suggestion that Gossman and Benner were motivated to discriminate against Waller because of his alleged "strong and open support" for the Union (p. 47 lines 13-20) or because of Waller's pre-election conduct in support of the Union.
- 40. To the ALJ's finding that the Company's "antiunion animus is also well established by the record" (p. 47 line 24) and that the Company ran an "antiunion campaign" (line 25) from which it may be inferred that the Company discriminated against employee Waller (lines 24-29).
- 41. To the ALJ's finding that "there is strong circumstantial evidence that the [Company's] antiunion animus motivated the decision to discharge Waller (p. 47 lines 31-32).
- 42. To the ALJ's affirmative finding based on nothing more than shards of testimony that Waller "did not have a reputation for being violent" (p. 47 line 42) and the ALJ's finding that Waller's "reputation" bears on the severity of the threats made by Waller.
- 43. To the ALJ's incomplete, exaggerated and misleading finding that "heated arguments and angry confrontations in which employees threatened to physically injure each other were both common, occurring weekly if not daily, and well tolerated at the mine" (p. 47 lines 47-49) and that the Company had "never prohibited or discharged any other employee for such conduct in the absence of any significant physical contact" (line 51 and p. 48 line 5).
- 44. To the ALJ's incomplete, exaggerated and misleading description of the incident involving employee Lane (p. 48 lines 8-15).
- 45. To the ALJ's findings with respect to the incident involving employees Crissup and Tadlock, to the ALJ's erroneous crediting of Crissup and discrediting of the testimony of Foreman Carter, and to the ALJ's finding that this incident is an example of disparate treatment of Waller by the Company (p. 48 lines 17-22 and fn. 46).

- 46. To the ALJ's finding that the incident between supervisors Hilliard and Stephenson demonstrates that the Company engaged in disparate treatment of Waller (p. 48 lines 24-34 and fn. 47) and to the ALJ's additional finding that Stephenson's answers to questions by the ALJ amounts to "evasive and incredible testimony" (p. 49 fn. 47). The record shows that the ALJ's questions were less than clear and that Stephenson's answers were not "evasive and incredible."
- 47. To the ALJ's finding that two recent incidents involving employees Bryan and Ashby (p. 49 lines 5-8) show disparate treatment of Waller by the Company.
- 48. To the ALJ's finding (p. 49 fn. 48) that the incident involving managers Francescon and Ward and the incident involving employee Vaughn show disparate treatment of employee Waller.
- 49. To the ALJ's misleading and disingenuous statement that the Company "no longer ...contends" that "all of the alleged incidents in the eight statements [of employees and supervisors] were the basis for Waller's discharge" (p. 49 lines 10-14). Mr. Benner gave straightforward and credible testimony as to why he approved Waller's discharge, which is at odds with the ALJ's finding.
- 50. To the ALJ's suggestions that the Company ever contended that "saying 'fuck you' to an employee or calling an employee a 'scab'" were reasons for Waller's discharge (p. 50 lines 7-8) and that Gossman testified that Waller was responsible for the anonymous phone calls or scratching employee Koerner's truck (p. 50 lines 8-11).
- 51. To the ALJ's erroneous finding that "the overwhelming weight of the evidence indicates that the [Company] has never really believed that the May 20 flagging incident was anything more than a routine work dispute certainly not that Waller actually

- threatened to run over or 'kill' Koerner and other employees with his coal hauler" (p. 50 lines 13-16), and that the incident is only mentioned "as an afterthought" in Manager Lawrence's statement (line 17). The Company also takes exception to the ALJ's implication that employee Davis's actions in his capacity as a shift lead indicate that Waller's misconduct was not viewed as serious (p. 50 lines 22-29).
- 52. To the ALJ's implication and finding that the actions of Manager Lawrence with respect to the flagging incident indicate that Waller's misconduct was not viewed as serious (p. 50 lines 31-39).
- 53. To the ALJ's implication and finding that the Company's actions on May 23 and 24 with respect to Waller indicate that Waller's misconduct was not viewed as serious (p. 50 lines 40-41, p. 51 lines 1-2).
- 54. To the ALJ's implication that Koerner's actions in how he "flagged" Waller were a reason or justification for Waller's actions (p. 50 fn. 50).
- 55. To the ALJ's finding that because Gossman's testimony varied with respect to asking Koerner why he had been flagging Waller, this somehow casts suspicion on the reason for Waller's discharge, when the evidence clearly shows that "flagging" is a routine and frequent practice underground (p. 51 lines 8-16). The Company also takes exception to the ALJ's similar finding with respect to Manager Lawrence (p. 51 fn. 51).
- 56. To the ALJ's incomplete and misleading quotation of the testimony of Gossman regarding his conversation with employee Meadows (p. 51 fn. 52).
- 57. To the ALJ's erroneous finding that "the preponderance of the evidence clearly indicates that the [Company] never really believed that the incident was anything more than what

- Waller testified to at the hearing: he and Koerner simply had a disagreement over whether the feeder was too gobbed up to continue dumping..." (p. 51 lines 19-22).
- 58. To the ALJ's erroneous finding that the Waller-Koerner incident had "nothing to do with threatening to run over or 'kill' anyone, because the car was already stopped at the feeder and dumping" (p. 51 lines 28-29); to the finding that the incident had nothing "to do with 'safety'...or a fear that Waller's conduct could result in a repeat of a 2010 fatal coal hauler accident at the mine"; to the ALJ's failure to find that Waller placed the incident with Koerner in early April rather than May 21 when it actually occurred and that Waller incredibly denied any incident on or near the date when all of the other evidence indicates that it in fact occurred (p. 51 lines 28-32); to the ALJ's failure to acknowledge or decide this conflict in the evidence and to his failure to find that Waller said "no matter how many times you flag me I won't stop"; to the finding that Gossman and Benner "chose to spin the incident because they knew that the other alleged incidents alone were insufficient to justify discharging Waller given the Company's history of tolerating similar or worse conduct by others unrelated to union activity" (p. 51 lines 34 - 52 and p. 52 lines 5-6); to the ALJ's omnibus and insufficiently explained or reasoned finding that any testimony of Gossman, Lawrence, Davis and Koerner that is contrary to these findings is discredited (p. 52 fn. 53); to the ALJ's discrediting of Koerner's testimony "that he felt threatened by Waller" (id.) and Davis's testimony that "supports Koerner's testimony that he felt seriously threatened and was afraid of Waller" (id.); and to the ALJ's finding that "I likewise discredit Davis's testimony that he was not carrying a radio that night and thus could not have heard the argument Koerner described between him and Waller at the feeder" (id.). The ALJ should have credited all of this testimony and

- discredited the testimony of Waller himself denying that any incident with Waller even occurred on the date in question.
- 59. To the ALJ's finding that the Company cannot establish an affirmative defense to the discharge of Waller because the Company has "clearly failed to meet its burden" (p. 52 line 21) and "the overwhelming weight of the ...evidence" is that the Company "never really believed that Waller had threatened the safety, health, or life of Koerner or anyone else, or that the incident was anything other than a routine work dispute" (p. 52 lines 22-24); and to the ALJ's further and wholly illogical finding that Gossman and Benner "deliberately twisted Waller's alleged statement into a threat to seriously injure or 'kill' Koerner and other employees to help bolster the Company's allegations against Waller in the election objections case and remove from the unit one of the Union's most vocal supporters in advance of the requested rerun election" (p. 52 line 25-27 p. 53 lines 5-6).
- 60. To the ALJ's finding that the General Counsel has proved that the Company discharged employee Waller for discriminatory reasons in violation of Section 8(a)(3) and (1) of the Act (p. 53 lines 8-10).
- 61. To the ALJ's conclusions of law 1 (p. 53 lines 14-15), and 3 (lines 23-27).
- 62. To the ALJ's recommended remedy, p. 53 lines 39-41 and p. 54 lines 5-9.
- 63. To the ALJ's recommended Certification of Representative (p. 56 lines 10-19).
- 64. To the following portions of the ALJ's recommended Order: p. 56 lines 32-33, lines 40-42; p. 57 lines 5-16.
- 65. To the recommended Notice to Employees insofar as it recites negative and affirmative requirements related to or involving the discharge of employee Waller.

## Respectfully submitted,

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Attorneys for Respondent Big Ridge, Inc.

Dated: December 29, 2011

## **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing has been served via Electronic Mail on the persons listed on the Service List below on this 29<sup>th</sup> day of December 2011.

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